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April 9, 2010

**VIA ECFS**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, D.C. 20554

Re: *Notice of Ex Parte Presentation*: WC Docket Nos. 06-172, 07-97, 09-135

Dear Ms. Dortch:


Yesterday, Lisa Youngers, of XO Communications, LLC, Charles Hunter, of Broadview Networks, Brad Lerner, of Cavalier Telephone, and Brad Mutschelknaus and the undersigned, of Kelley Drye & Warren LLP, met with Wireline Competition Bureau staff persons Jay Atkinson, Denise Coca, Margaret Dailey, Bill Dever, Henry Greenridge, Marcus Maher, Pam Megna, Jenny Prime, Tim Stelzig, and Donald Stockdale, and Dianne Griffen Holland, Austin Schlick, and Julie Veach, of the Office of the General Counsel, to discuss the above-captioned proceedings. We urged the Commission to retire the *Omaha* standard and replace it with a market power based framework for analysis of requests for forbearance from Section 251(c)(3) unbundling rules. We also urged the Commission to deny Qwest's Section 251(c)(3) forbearance request for the Phoenix MSA for failure to meet the substantive requirements of Section 10.

The attached document, which was distributed at the meeting, describes the specific points addressed during the meeting.

KELLEY DRYE & WARREN LLP

Ms. Marlene H. Dortch  
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Please contact the undersigned at (202) 342-8531 if you have any questions regarding this letter.

Respectfully submitted, 



Genevieve Morelli

Attachment

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# **UNE FORBEARANCE**

**WC Docket Nos. 06-172, 07-97, 09-135  
Broadview Networks, Inc.  
Cavalier Telephone  
XO Communications, LLC**

**April 8, 2010**

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## **PREMATURE ELIMINATION OF UNBUNDLING OBLIGATIONS WOULD HAVE A CHILLING EFFECT ON BROADBAND DEPLOYMENT**

- Competitive providers must have a reasonable opportunity to reach end users on an economically rational, non-discriminatory basis.
- In many locations, ILEC loops continue to be the only viable means for providers to reach end users.
  - UNEs are being used to provide next-gen VoIP, Ethernet Over Copper, bonded T1s, etc.
- In those situations, access under Section 251 is essential to enable broadband competition.

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## THE COMMISSION SHOULD RETIRE THE FORBEARANCE STANDARD USED IN THE *OMAHA* ORDER

- The Commission's reliance in *Omaha* on its predictive judgment regarding post-forbearance ILEC behavior has proven to be a mistake. One of the largest competitors exited the market as a direct result of its inability to secure wholesale inputs at prices that would allow it to continue to compete. Consumers have been left with an ILEC/cable duopoly.
- On remand, the Commission must apply the *Omaha* standard or adopt a different standard and explain why it has done so.
- The *Omaha* standard should be replaced because it falls short of meeting the requirements of Section 10.

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## THE COMMISSION SHOULD RETIRE THE FORBEARANCE STANDARD USED IN THE *OMAHA* ORDER

- Critical shortcomings of the *Omaha* standard include:
  - Failure to recognize distinctions between relevant product markets.
  - Failure to recognize that duopoly markets are not competitive and reliance on a single facilities-based competitor.
  - Lack of meaningful wholesale competition.

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## THE COMMISSION SHOULD RETIRE THE FORBEARANCE STANDARD USED IN THE *OMAHA* ORDER

- Several elements of the *Omaha* analysis are important to any consideration of whether forbearance from Sec. 251(c)(3) is warranted however.
  - Competitors must offer a full range of substitutable services.
  - Only loop-based competition is properly included in the analysis.
    - Any competitive activity that is the result of continuing use of ILEC local loops (*i.e.*, wholesale services, UNEs, special access) is not properly included.

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## WHETHER FORBEARANCE IS WARRANTED SHOULD BE BASED ON WHETHER THE PETITIONER HAS MARKET POWER

- The market power approach:
  - Incorporates appropriate elements of the *Omaha* standard while avoiding its material shortcomings.
  - Has been perfected through development and application in a variety of proceedings over the past 20 years.
    - The Commission has applied market power principles to assess petitions seeking forbearance from dominant carrier rules.



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# ELEMENTS OF A MARKET POWER ANALYSIS

- In a market power analysis, the Commission must:
  - Delineate all relevant product and geographic markets.
  - Identify the firms that are current and potential suppliers in each market.
  - Determine whether the carrier under evaluation possesses individual market power in each market.

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# ELEMENTS OF A MARKET POWER ANALYSIS

## ■ Product Markets

- The Commission must identify and aggregate consumers with similar demand patterns.
  - Are the services offered to one group of consumers adequate or feasible substitutes for the services offered to the other group?
- Using FTC/DOJ guidelines, a product market is a product or group of products “such that a hypothetical profit-maximizing firm that was the only present and future seller of those products ...likely would impose at least a ‘small but significant and nontransitory’ increase in price (SSNIP).”
- For each product market, separate wholesale and retail market analyses should be conducted.

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# ELEMENTS OF A MARKET POWER ANALYSIS

- Geographic Market
  - Petitioning carrier's service territory within an MSA.
- Current and Potential Suppliers
  - All actual and potential suppliers in a particular product and geographic market must be identified.
  - The petitioning party bears the burden of identifying active and potential suppliers and producing all data necessary to evaluate each supplier's presence (or potential presence).

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# ELEMENTS OF A MARKET POWER ANALYSIS

- The state of competition in the individual product and geographic markets at issue then must be comprehensively assessed.
- Those elements include a review of:
  - Petitioner's market share.
  - Elasticity of the market.
  - Petitioner's cost structure, size and resources.

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# ELEMENTS OF A MARKET POWER ANALYSIS

- Market share (*i.e.*, actual competition) is very important but market share alone does not determine whether a carrier possesses market power.
  - Section 10 focuses on present day market realities so although potential competition is relevant, more weight should be afforded to actual competition.
  - The Commission should review the extent to which actual and potential suppliers either possess their own last-mile facilities or can easily obtain them from non-ILEC sources.
    - Are there economic or operational barriers that preclude actual and potential suppliers from obtaining additional capacity through self-supply?
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## **THE COMMISSION SHOULD BASE ITS REMAND DECISION ON THE STATE OF THE FACTUAL RECORDS AT THE TIME THE INITIAL DECISIONS WERE RENDERED**

- The D.C. Circuit's decision to remand did not relate to the Commission's treatment of facts. The Court focused strictly on the legal standard the Commission applied.
  - The Commission must provide legal justification for the standard it used or adopt a different standard.
- The petitioning parties would not be prejudiced by reliance on the initial factual records.

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## **THE QWEST PHOENIX PETITION SHOULD BE EVALUATED BASED ON A MARKET POWER ANALYSIS**

- The Commission should adopt relevant product markets.
- Residential and business.
  - Residential customers typically require basic voice capabilities and have lesser data demands. They are served through mass marketing techniques and typically do not enter into long term agreements.
  - Business customers have higher volume, sophisticated voice and data needs and usually are served under individual, multi-year contracts marketed and administered through direct sales contacts.

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# **THE QWEST PHOENIX PETITION SHOULD BE EVALUATED BASED ON A MARKET POWER ANALYSIS**

## **■ Geographic Market**

- Qwest's service territory in the Phoenix MSA.

## **■ Data**

- All data regarding all actual and potential market participants must be presented for review and analysis.
  - Qwest bears the burden of proof and persuasion.
  - The data Qwest has provided has a host of shortcomings.
    - Data is largely anecdotal.
    - Data is useless because it is generic, conclusory, or not subject to verification.
  - Qwest has not responded by curing defects.
  - CLECs, including XO, have provided data in their possession.
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# **THE STATE OF FACILITIES-BASED BUSINESS MARKET COMPETITION IN THE PHOENIX MSA DOES NOT JUSTIFY A FINDING OF NO MARKET POWER**

- **Data on Facilities-Based Competition.**
  - Qwest is largely silent regarding the extent to which competitors in Phoenix are using their own last-mile facilities to provide service to business customers (*e.g.*, Harte-Hanks survey results).

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# THE STATE OF FACILITIES-BASED BUSINESS MARKET COMPETITION IN THE PHOENIX MSA DOES NOT JUSTIFY A FINDING OF NO MARKET POWER

- Cable Competition.

- Data regarding the competitive activities of Cox in the business market:
  - **Is not Phoenix-specific. Estimates provided are of national competition.**
  - **Is comprised of Cox promotional/marketing materials.**

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## **THE STATE OF FACILITIES-BASED BUSINESS MARKET COMPETITION IN THE PHOENIX MSA DOES NOT JUSTIFY A FINDING OF NO MARKET POWER**

- Cable Competition (cont'd).
  - Cable system technology still faces serious operational hurdles.
  - There are constraints on the amount of business services Cox can accommodate.
  - XO-provided data estimates the number of buildings in Phoenix in which Cox is providing business services.

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# **THE STATE OF FACILITIES-BASED BUSINESS MARKET COMPETITION IN THE PHOENIX MSA DOES NOT JUSTIFY A FINDING OF NO MARKET POWER**

## **■ CLEC Competition.**

- Qwest provides no data on the extent of business market competition by CLECs using non-Qwest last-mile facilities.
- Qwest's CLEC fiber network data does not show the extent to which this fiber can support the offering of a full range of services to individual customer locations.
- Qwest's claim regarding the number of buildings with competitive fiber is grossly overstated.
  - GeoResults data shows that only 0.19% of commercial buildings in the Phoenix MSA are lit by CLECs.
  - CLECs' addressable demand market share in the Phoenix MSA is less than 1%.

# **THE STATE OF FACILITIES-BASED BUSINESS MARKET COMPETITION IN THE PHOENIX MSA DOES NOT JUSTIFY A FINDING OF NO MARKET POWER**

- **Competition from VoIP Providers.**
  - VoIP providers in the Phoenix MSA do not provide facilities-based last-mile alternatives to Qwest.
    - Qwest has provided no data regarding the extent to which VoIP services are being provided over Qwest's facilities versus the facilities over other facilities-based carriers in Phoenix.
  - The VoIP services offered by carriers serving the Phoenix MSA as part of their overall business services package do not provide a separate source of facilities-based competition from their fiber networks accounted for elsewhere.

## **THE STATE OF FACILITIES-BASED BUSINESS MARKET COMPETITION IN THE PHOENIX MSA DOES NOT JUSTIFY A FINDING OF NO MARKET POWER**

- Multiple wholesale facilities-based alternatives to the ILEC are vital to ensuring a competitive market.
- Qwest's reliance on the wholesale fiber network offerings of carriers in Phoenix fails to take into account:
  - These providers access substantially less than 1000 commercial buildings and may not have access to the entire building.
  - There is considerable cost associated with adding "near net" buildings and there must first be a business case for doing so.
  - The comments detail the significant constraints on using the wholesale facilities of Cox, SRP Telecom, AGL Networks, and XO in Phoenix.

# **THE STATE OF FACILITIES-BASED BUSINESS MARKET COMPETITION IN THE PHOENIX MSA DOES NOT JUSTIFY A FINDING OF NO MARKET POWER**

## **■ Wireless Competition.**

### **□ Fixed Wireless.**

- Nextlink currently is not a significant competitive alternative to Qwest in the Phoenix business market on either a wholesale or retail basis.

### **□ Mobile Wireless.**

- Qwest does not contend that competition from mobile wireless services in the business market in Phoenix supports its forbearance request.

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# CONCLUSIONS

- The Commission should retire the *Omaha* standard and adopt a market power based framework for analysis of requests for forbearance from Section 251(c)(3) unbundling rules.
- The Commission should deny Qwest's Section 251(c)(3) forbearance request for the Phoenix MSA for failure to meet the substantive requirements of Section 10.